85-721

No. .....

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILDRED STETZ, Personal Representative of the Estate of CHARLES K. ATTWOOD, Deceased,

Petitioner,

—against—

JOHN A. GRANT, M.D.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GARY I. STRAUSBERG
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QUESTION PRESENTED FOR REVIEW

WHERE A JAIL DOCTOR PROHIBITED AN INMATE WHO HAD A BRAIN TUMOR FROM KEEPING AN APPOINTMENT WITH A NEUROSURGEON, RESULTING IN THE INMATE'S DEATH, AND A JURY FOUND THE DOCTOR LIABLE FOR "DELIBERATE INDIFFERENCE," AND AWARDED PUNITIVE DAMAGES, MAY A TRIAL COURT SET ASIDE THE VERDICT,

A) WITHOUT VIOLATING THIS COURT'S HOLDING IN ESTELLE V. GAMBLE, 429 U.S. 97 (1976), THAT "DELIBERATE INDIFFERENCE TO A PRISONER'S SERIOUS ILLNESS OR INJURY STATES A CAUSE OF ACTION UNDER §1983"? AND

B) WITHOUT VIOLATING PETITIONER'S RIGHTS UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILDRED STETZ, Personal Representative
of the Estate of
Charles K. Attwood, Deceased,

Petitioner,

v.

JOHN A. GRANT, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Petitioner, Mildred Stetz, Personal Representative of the Estate of Charles K. Attwood, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment of the

United States Court of Appeals for the Fourth Circuit entered on August 15, 1985, affirming the judgment of the United States District Court for the District of Maryland, entered on June 29, 1984. That judgment affirmed the granting of a motion for judgment notwithstanding the verdict by Magistrate Daniel E. Klein, Jr., on April 2, 1984, setting aside a jury verdict for the Petitioner returned on July 8, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is a one-paragraph, unreported, per curiam opinion, which is reproduced in Appendix A (1a - 3a). That opinion adopts the opinion of the United States District Court for the District of Maryland, which is reproduced in Appendix C (28a - 43a). The District Court opinion, in turn, is based

on the opinion of Magistrate Klein, and that opinion is reproduced in Appendix B (6a - 25a).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

United States Constitution, Amendment VIII: "Excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punish-ments inflicted."

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983. Civil Action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> R.S. § 1979; Pub.L. 96-170, § 1, Sec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

Petitioner, Mildred Stetz, as the Personal Representative of the Estate of her son, Charles Keith Attwood, instituted this action against Respondent, John Grant, M.D., under 42 U.S.C. §1983, for deliberate indifference to her son's serious medical needs. Jurisdiction was based on the existence of a Federal question under 28 U.S.C. §1331. She contended that Attwood, who was suffering from a brain tumor, was under the custodial medical care of Grant, and that Grant refused to let him keep an appointment with a neurosurgeon, who could have operated on the tumor. A week after the would-be appointment, Attwood collapsed, still under Grant's custodial medical care, and died of the brain tumor. Had Attwood been able to keep his appointment, he would have been treated and survived.

After an eight day jury trial before Magistrate Daniel E. Klein, Jr., on July 8, 1983, the jury unanimously found, by special verdict, that Grant was deliberately indifferent to Attwood's serious medical needs. In addition, although awarding only one dollar in nominal damages, the jury found Dr. Grant's conduct to have been so outrageous that they awarded $30,000.00 in punitive damages.

Nine months later, on April 2, 1984, Magistrate Klein granted a Motion for Judgment n.o.v. and set aside the verdict because, in the Magistrate's view, as stated in his Memorandum Opinion, the evidence was insufficient to support a verdict of "deliberate indifference" (App. B, 6a - 25a). The outrageousness of Grant's conduct, reflected in the jury's verdict, was perhaps surpassed only by the action of

the Magistrate in setting aside the jury verdict, based on a rendition of the facts which bore little resemblance to the testimony and evidence in court. Regrettably, the District Judge and the Fourth Circuit Court of Appeals affirmed on the basis of the facts recited in the Magistrate's Opinion. Stetz appealed the Magistrate's decision to Edward S. Northrop, Senior Judge of the United States District Court for the District of Maryland, who affirmed Magistrate Klein (App. C, 28a - 43a). On August 10, 1984, the Fourth Circuit Court of Appeals granted Stetz' Petition for Leave to Appeal. (App. A, 4a - 5a). On August 15, 1985, the Fourth Circuit Court of Appeals affirmed in a per curiam opinion adopting the district court opinion. (App. A, 1a - 3a). The Petition herein followed.

In 1981, Attwood, aged thirty-seven, began to have episodes of illness. He experienced headaches, spells of vomiting, numbness and bizarre behaviour. He lost his job, was unable to work and to provide child support payments. In late July, 1981, Attwood was hospitalized at Easton Memorial Hospital, where a diagnosis of a probable brain tumor was made by a neurosurgeon. Further neurological "work up", including a CAT scan, was to be done on an outpatient basis, and he was discharged from the hospital at the end of July and scheduled for a followup appointment with the neurosurgeon.

Four days prior to the scheduled appointment with the neurosurgeon, on August 24, 1981, Attwood was arrested for failing to make child support payments. He was found in civil contempt of court because of his failure to make the payments and was sentenced to confinement

in the Kent County Jail for a period not to exceed ninety days.

Attwood's mother, the Petitioner, concerned about her son's condition and his ability to keep his August 28th appointment with the neurosurgeon, went to the Kent County Jail to request that her son keep that appointment. She was told that that would be up to the jail physician, the Respondent, Grant. She informed Grant, through his nurse, of her son's appointment with the neurosurgeon and that she was anxious to have it kept; she informed Grant, of her son's poor condition, and of his recent hospitalization at the Easton Memorial Hospital where he had been seen by a neurosurgeon, and that a CAT scan had been recommended. When Mrs. Stetz went to see Grant, he was not there, but she was able to speak to Dr. Grant's nurse, Ms. Dick, who made notes of the conversation and furnished

them to Grant that day, stating as follows:

Charles Attwood Mother's # 552-6132
Kent Co. Jail

8/26/81 Above's mother Mrs. Stetz from Church Hill visited KCHD today. States son taken to jail 8/24/81 p.m. for NON-support. Apparently on 7/25/81 Chas Atwood had "spell" and fell from chair to floor "did not faint" Was seen - E.R. of Easton Memorial Hospital and admitted. Discharged 7/29/81. Apparently seen by Dr. Bering, neurologist, while a patient in Easton. Apparently mother was told by a Dr. Wood that patient should have a CAT scan.

Pt. has appt with Dr. Bering of Talbottown, Easton, at 10:30 a.m. on August 28th.

Mother states her son had encephalitis as child. Mother feels that son is deteriorating. She claims he has lost much of hearing left ear. She states that he walks like an old man. She states that Charles Atwood tells her his head hurts but that he has said nothing to the jailers. She states he's not one to complain. Mother is most anxious that her son be able to keep appt with Dr. Bering on Friday a.m. (1) Can you see him? (2) Can you arrange to have him taken for

checkup with Dr. Bering?

Dick

On August 27, 1981, Grant saw Attwood, and despite Grant's awareness about Attwood's serious neurological condition, he conducted an incomplete neurological examination, and failed to call the Easton Memorial Hospital to find out what diagnosis had been made. Dr. Grant was told by Mrs. Stetz that Attwood had difficulty walking. Yet, he did not test Attwood's gait and did not remove the shackles from his legs. Dr. Grant omitted this part of the examination even though "gait" was one of five items specified in the neurological section of the physical examination form filled out by Dr. Grant. From Attwood's health history and a physical examination, Dr. Grant learned that Attwood was suffering from hearing loss, shortness of breath, frequent and painful urina-

tion, night sweats, recent variation in weight, frequent indigestion, epileptic seizures, frequent and severe headaches, periods of unconsciousness, paralysis, numbness, weakness, dizziness, and fainting spells. Because Attwood told him he had once had a drinking problem, Dr. Grant attributed Attwood's symptoms to alcoholism.

Had Dr. Grant obtained the Easton Memorial Hospital records, or made a telephone call there or to the neurosurgeon who was to see Attwood, he would have seen that Attwood's symptoms could not have been attributed to alcoholism. Even without those records, and without making the telephone calls, however, Grant knew that Attwood had a brain tumor or another serious neurological condition. By his own subsequent actions Grant virtually admitted that he suspected that Attwood had a tumor: upon

being told, on September 5, 1981, that Attwood had collapsed, Grant immediately noted a diagnosis of "mass lesion" or "cerebral tumor," even though he had not seen the patient again since their first and only meeting on August 27, 1981. Nevertheless, on August 27, he conveniently attributed Attwood's symptoms to alcoholism to avoid sending him to the neurosurgeon for further neurological examination and treatment which Attwood so desparately needed. Despite Mrs. Stetz's urgings, Dr. Grant refused to let Attwood keep his appointment with the neurosurgeon. He told her he didn't want to tie up a State trooper (who would have to drive Attwood to the neurosurgeon) because it would cost the county too much money. Over a week later, on September 4, 1981, Attwood collapsed in his jail cell, and on the next day died of what was diagnosed as a brain tumor.

Two prominent physicians, Dr. Stuart Grossman, an internist and oncologist from the Johns Hopkins Medical Center, and Dr. Edgar Bering, a neurosurgeon, formerly a distinguished member of the Harvard Medical School Faculty, testified that it must have been apparent or obvious to Dr. Grant that Attwood had a serious neurological condition, that Dr. Grant should have obtained the Easton Memorial Hospital records (or at least inquired about them), and should have allowed Attwood to keep his appointment of August 28th, or at least called the neurosurgeon. Dr. Bering testified that Dr. Grant's inaction amounted to "neglect" and "indifference to serious medical needs". Dr. Grossman testified that Dr. Grant's failure to find out more information about Attwood's neurological condition, which could have been done by a telephone call, before refusing

to let him see the neurosurgeon, demonstrated a lack of concern on the part of Dr. Grant. Both physicians agreed that Attwood had an operable tumor, and that had Attwood been allowed to be treated for his tumor, he would have survived.

Drs. Bering and Grossman characterized Dr. Grant's conduct as "indifferent," "neglectful," or lacking "concern." The substance of their testimony as a whole was that Dr. Grant was extremely indolent and remiss in failing to secure information about Attwood's condition from the Easton Memorial Hospital or Dr. Bering, in failing to remove Attwood's shackles and test his gait, in attributing most of Attwood's symptoms to alcoholism and, most importantly, in refusing to allow Attwood to keep his neurological appointment.

REASONS FOR GRANTING THE WRIT

I. DR. GRANT'S CONDUCT IN REFUSING TO ALLOW ATTWOOD, AN INMATE SUFFERING FROM A BRAIN TUMOR, TO KEEP HIS APPOINTMENT WITH THE NEUROSURGEON, WAS SO OUTRAGEOUS THAT SETTING ASIDE THE VERDICT OF "DELIBERATE INDIFFERENCE" BY THE LOWER COURTS TOTALLY DISREGARDS THIS COURT'S HOLDING IN ESTELLE v. GAMBLE, 429 U.S. 97 (1976). THIS COURT SHOULD CLARIFY THE STANDARD OF "DELIBERATE INDIFFERENCE" TO SERIOUS MEDICAL NEEDS IN LIGHT OF THE LOWER COURTS' SUBVERSION, EMASCULATION, AND CIRCUMVENTION OF THE STANDARD.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976), is the seminal case establishing that deliberate indifference to an inmate's serious medical condition on the part of a prison doctor is actionable under §1983. This Court stated that while negligence in diagnosis or treatment, which may amount to medical malpractice, does not constitute a valid §1983 action, a valid cause of action is stated where there are "acts or ommissions sufficiently harmful to evidence deliberate indifference to serious medi-

cal needs." 429 U.S. at 106, 97 S.Ct. at 292. This Court held:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain...," proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under §1983. (emphasis added).

419 U.S. at 104-105.

Application of the Estelle standard to this case raises the issue of whether the Eighth Amendment requires a prison doctor not to ignore the medical needs of an inmate who has or may have a brain tumor or other serious neurological condition, by refusing to permit the inmate to keep a previously scheduled appointment with a neurosurgeon.

Grant argued below, and the

lower courts apparently agreed, that Estelle insulates from §1983 liability prison doctors' decisions regarding additional diagnostic tests or treatment. Grant and the courts below relied on an isolated passage in Estelle at 107:

> the question whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. (emphasis supplied).

It is clear, however, that Estelle focuses not on the type of medical procedure, but on the state of mind of the doctor. In the quoted sentence this Court explained that choosing, as a matter of medical judgment, between alternative diagnostic routes does not evidence deliberate indifference. This Court did not there rule that any refusal of diagnostic treatment, no matter how unjustified, no matter how obvious the need for

treatment, is absolutely insulated. The distinction made in Estelle is between conduct resulting from deliberate indifference, which grounds a cause of action under §1983, and conduct resulting from negligent medical judgment, which does not.

In Estelle, the plaintiff had been seen by medical personnel on seventeen separate occasions in a three-month period. He was treated for every ailment of which he complained, including the back injury on which he based his suit. "The doctors diagnosed his injury as a lower back strain and treated it with bed rest, muscle relaxants and pain relievers." Id. The plaintiff claimed that more should have been done and that an X-ray should have been done. Unlike the present case, there was no indication that an X-ray would have revealed any new diagnosis, nor that any prison medical

personnel had reason to believe it would. Under those circumstances, the decision not to provide an X-ray or other diagnostic procedure was at worst, a difference of opinion in a matter of medical judgment.

The question for the jury in this case was whether Dr. Grant was guilty of deliberate indifference, "regardless of how evidenced," Id. at 105, to Attwood's medical condition. The jury was therefore asked to infer Dr. Grant's mental state, which it did. That the jury inferred deliberate indifference from, inter alia, Dr. Grant's refusal to allow further diagnostic steps rather than, for example, a request to perform surgery, is an irrelevant distinction. Moreover, the jury's verdict was based not only on Dr. Grant's refusal to allow Attwood to be seen by the neurosurgeon, but also on his failure to call the

neurosurgeon, his failure to call the Easton Memorial Hospital or secure its records, his dismissal of Mrs. Stetz's urgings, his reluctance to tie up a state trooper, his failure to remove Attwood's shackles and test his gait, and his attribution of Attwood's symptoms to alcoholism.

Dr. Grant's contention that he give Attwood a "thorough" physical examination before making a diagnosis of alcoholism, which the lower courts cited as evidence of lack of deliberate indifference to overturn the verdict, finds no support in the record and was properly rejected by the jury.

Five months after Attwood's death, when Grant became aware that attorneys were investigating the circumstances of Attwood's death, Grant requested past medical records from a clinic which had treated Attwood, using an

authorization form which had been signed by Attwood without advising the clinic that Attwood had already died five months earlier. This concern for Attwood's medical condition was totally lacking five months earlier, during the critical period when Attwood was still alive. At that time, he ignored Attwood's most serious medical problem -- a brain tumor or other serious neurological disorder.

By adopting the District Judge's (and hence the Magistrate's) opinions, the court below grievously erred in concluding "that the evidence in this case cannot support a conclusion that Grant acted through deliberate indifference to Attwood's medical conditon." The court mistated the facts, misconstrued the law, misapplied constitutional principles, and misinterpreted the "deliberate indifference" standard, in order to render a judgment in derogation of the jury's

verdict. The decision below strays so far from the principles established in Estelle as to require review and clarification by this Court. Review is necessary so that this Court may also define the Eighth Amendment's constitutional requirements of medical care for the prison population.

II. THE ACTION OF THE LOWER COURTS IN SETTING ASIDE THE JURY VERDICT OF DELIBERATE INDIFFERENCE AND AWARD OF PUNITIVE DAMAGES BY DISTORTING THE EVIDENCE, DISREGARDING THE TESTIMONY AND DRAWING INFERENCES CONTRARY TO THE VERDICT, SO FLAGRANTLY VIOLATES THE SEVENTH AMENDMENT TO THE CONSTITUTION AS TO REQUIRE THIS COURT'S REVIEW AND INTERVENTION.

On a defendant's motion for judgment notwithstanding the verdict on the ground of insufficiency of the evidence, the evidence and all inferences must be considered in the light most favorable to the plaintiff, and the Seventh Amendment prohibits the district

judge to weigh the evidence and substitute his judgment of the facts for that of the jury. Lavender v. Kurn, 327 U.S. 645 (1946); Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047 (4th Cir. 1976) cert. den. sub nom, Kayser-Roth v. Tights, Inc., 429 U.S. 980 (1976); Dace v. ACF Industries, Inc., 722 F.2d 374, 375 (8th Cir. 1984).

> [The] Seventh Amendment writes into the basic charter the belief that trial by jury is the normal and preferable mode of disposing of issues of fact in civil cases * * *. The Supreme Court has been zealous to safeguard, perhaps even to enlarge, the function of the jury. . .

Harner v. John McShain, Inc., 394 F.2d 480, 481 (4th Cir. 1968).

Contrary to this Court's and, indeed, its own clear directives, the court below (by adopting the District Judge's Opinion which had in essence adopted the Magistrate's Opinion) weighed the evidence against Mrs. Stetz, impro-

perly drew inferences for Dr. Grant which the jury reasonably drew against him, and relied on Grant's testimony against the evidence put on my Mrs. Stetz. The lower courts usurped the jury's role and denied Mrs. Stetz' Seventh Amendment rights.

This was not a case of mere difference of opinion between an unknowledgeable prisoner and his doctor regarding alternative treatments or diagnostic steps. It was apparent to Dr. Grant that Attwood had a brain tumor or a severe neurological condition, and that it was imperative he keep the appointment with the neurosurgeon. Yet, he was oblivious to Attwood's plight. It is easy to see why the jury found deliberate indifference, and clear that this conclusion was based on sufficient evidence.

The jury instructions based on the applicable law were clear. The lower court, then, had no reason to believe

that the jury misconstrued the law or misapplied the facts to the law. The jury was instructed in pertinent part, as follows:

> If you find that Dr. Grant was acting under color of state law, and not in his private capacity, you must then determine whether Charles Attwood was deprived of a right secured by the Constitution or other federal law. In this case, plaintiff Stetz has alleged that her son, Charles Attwood, was deprived of his rights under the Eighth Amendment to the Constitution of the United States. The Eighth Amendment ot the United States Constitution provides in part that persons convicted of crimes shall not be made to suffer "cruel and unusual punishment". The concept of "cruel and unusual punishment" includes the unnecessary and wanton infliction of pain by deliberate indifference to serious medical needs. Therefore, deliberate indifference to serious medical needs involves more than mere negligence or medical malpractice. Deliberate indifference is that indifference which results in the wanton and unnecessary infliction of pain or physical injury....
>
> If you find that the plaintiff has proven by a preponderance of the evidence that Charles Attwood had a serious medical need and that Dr. Grant recognized or should have recognized Charles Attwood's serious

> medical need and that Attwood needed a neurological examination, but nevertheless failed to allow Attwood to keep his appointment with Dr. Bering you may infer a lack of concern on the part of Dr. Grant which would amount to deliberate indifference to Attwood's serious medical needs. However, if you find that Dr. Grant diligently examined Charles Attwood, and made a judgment on the basis of his informed medical opinion not to send Attwood to Dr. Bering, you may find that Dr. Grant was not indifferent to Charles Attwood's serious medical needs.

The lower courts' action is particularly unsupportable because issues of subjective state of mind, such as deliberate indifference, are preeminently factual issues for the jury. Miller v. Premier Corp., 608 F.2d 973, 982 (4th Cir. 1979); Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980).

In Doe v. New York City Department of Soc. Ser., 709 F.2d 782 (2nd Cir. 1983), cert. den. 464 U.S. 864 (1983), the Court held that a jury could infer deliberate indifference from omissions

in reporting or investigating sexual abuse of the plaintiff, a child placed in a foster home by the defendant. The trial court had set aside the jury verdict, granted the defendant's motion for judgment n.o.v., and found that the evidence may have demonstrated negligence or poor judgment, but not deliberate indifference. The appellate court found that the trial judge "usurped the function of the jury," Id. at 791. Similarly here, Magistrate Klein usurped the function of the jury by imposing his own view of the evidence, as well as his own notions of deliberate indifference, in setting aside the verdict. The jury unanimously concluded that Grant was deliberately indifferent, and the Magistrate should not have rejected that conclusion, second guessing the jury with the stroke of a pen.

In addition to ignoring most of

the evidence which supported the jury's verdict for Mrs. Stetz and withdrawing inferences from the jury, the Magistrate erred in relying on Dr. Grant's testimonial evidence to negate Mrs. Stetz's case. This was, again, a subversion of the proper procedure on a motion for judgment notwithstanding the verdict. The jury weighed Dr. Grant's testimony and his credibility and did not believe him. The lower courts (by adopting the Magistrate's misrecitation of the facts) should not have reexamined Dr. Grant's credibility and should not have relied on Dr. Grant's testimony contrary to the jury's conclusions. Tights, supra, at 1055; Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941). The mere fact that a witness is interested in the outcome of the suit is sufficient to require the testimony, even if uncontradicted, to be submitted to the

jury to accept or disbelieve, and the court cannot substitute its judgment for that of the jury. Sartor v. Arkansas Natural Gas Co., 321 U.S. 620, 627 (1944).

The lower courts relied on the testimony of Drs. Grossman and Bering to conclude that Dr. Grant's actions were a matter of medical judgment and that Plaintiff merely "disputes Dr. Grant's medical judgment" and that "such judgments are not subject to judicial review and do not rise to constitutional significance absent deliberate indifference." The disagreement of Doctors Bering and Grossman with Dr. Grant was not limited to medical judgment. Magistrate Klein ignored the bulk of the testimony by Drs. Bering and Grossman, and by a process of selective omission and ingenuous distortion he impermissibly inferred only a disagreement with Dr. Grant's medical

judgment, and substituted his judgment for that of the jury. The District Judge and the Fourth Circuit Court of Appeals plainly accepted the Magistrate's twisted version of the facts and therefore affirmed.

The courts below disregarded the Seventh Amendment.

> Occasionally verdicts may be returned with which judges strongly disagree. This is a price, we think, worth paying for the jury system, which is enshrined in the Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve heads are better than one.

Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1984), relying on Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949).

The lower courts have interfered with the most basic and primary function of the jury. The jury found from the evidence that Dr. Grant was deliberately indifferent. The verdict of deliberate indifference was compelling, and setting

it aside was in derogation of Estelle v. Gamble, and the Seventh Amendment to the U.S. Constitution. The Fourth Circuit Court of Appeals affirmance of the lower court's contemptuous disregard of Estelle v. Gamble, and violation of the Seventh Amendment calls for review by this Court. Review is necessary so that, aside from clarifying the "deliberate indifference" standard, and defining the Eighth Amendment's requirements for medical care to the prison population, this Court may also safeguard the Seventh Amendment.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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3062h

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84 - 1844

Mildred Stetz, Personal Representative of the Estate of Charles K. Attwood, Deceased,

Appellant,

versus

John A. Grant, M.D.,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Daniel E. Klein, Jr., Magistrate. (C/A N-82-1168).

Argued: June 5, 1985
Decided: August 15, 1985

Before WIDENER and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Gary I. Strausberg, Matthew W. Nayden (Melnicove, Kaufman, Weiner & Smouse, P.A. on brief) for Appellant; David R. Thompson (Franch, Earnest & Cowdrey, P.A. on brief) for Appellee.

PER CURIAM:

Mildred Stetz brought this action under 42 U.S.C. Section 1983 against Kent County health officer John Grant, claiming that Grant had been deliberately indifferent to the serious medical needs of Stetz's decedent, Charles Attwood. The jury returned a verdict in favor of the plaintiff, but the presiding magistrate granted defendant's motion for a judgment notwithstanding the verdict. Stetz appealed to the district court pursuant to Fed.R.Civ.P. 73(d), and the court affirmed the ruling of the magistrate. Stetz now appeals to this court. We find that the decisions below properly determined that the evidence in this case cannot support a conclusion that Grant acted through deliberate indifference to Attwood's medical condition. We therefore affirm the

judgment for the reasons set forth in the opinion of the district court. Stetz v. Grant, C/A N-82-1168 (D.Md. June 29, 1984).

AFFIRMED.

3064h/1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1135

MILDRED STETZ, as the Personal Representative of the Estate of Charles K. Attwood, Deceased

Filed: August 10, 1984

Plaintiff/
Petitioner

v.

JOHN A. GRANT, M.D.

Defendant/
Respondent

O R D E R

It is ORDERED that plaintiff's petition for permission to appeal from the judgment of the district court dated June 29, 1984 shall be, and it hereby is, granted.

It is further ORDERED that the clerk will process the appeal in the ordinary course of business.

With the concurrence of Judge Phillips and Judge Butzner.

/s/ H. Emory Widener, Jr.
For the Court

3064h/2

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MILDRED STETZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES K. ATTWOOD, DECEASED	*	
		CIVIL ACTION NO.
v.	*	
		N 82-1168
JOHN A. GRANT, M.D.	*	

* * * * * * *

MEMORANDUM

On May 6, 1982, the plaintiff, Mildred Stetz, Personal Representative of the Estate of Charles K. Attwood, deceased[1], filed a claim pursuant to

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1. The original complaint and the amendment thereto which was filed on July 30, 1982, (Paper No. 14) also named as plaintiff Attwood's three minor children. However, on January 28, 1983, Edward S. Northrop, Senior United States District Judge, adopted a Magistrate's Report and Recommendation (Paper No. 24) rejecting plaintiff's contention that wrongful death claims may be brought under 42 U.S.C. Section 1983. (Paper No. 28). Therefore, the minor children were dropped as plaintiffs in this case.

42 U.S.C. Section 1983 against Kent County, H. Allan Blizzard, Sheriff, Lieutenant Lamote Cooke, Kent County Jail Administrator and John A. Grant, M.D. The complaint was subsequently amended (Paper No. 14) to delete as party defendant, Kent County and to add a party defendant Board of Commissioners of Kent County. The latter's motion to dismiss was granted on January 28, 1983, (Paper No. 23). The parties subsequently consented to final disposition of the matter before the undersigned. (Paper No. 63). The matter was then scheduled for jury trial. Prior to the commencement of the jury trial on June 28, 1983, plaintiff moved to dismiss defendant Cooke and that motion was granted. During the course of the jury trial plaintiff subsequently moved to dismiss defendant Blizzard and that motion was also granted and the case proceeded only against defendant Grant

After an eight day trial, the jury returned a verdict in favor of the Plaintiff against defendant Grant for nominal damages of $1 and punitive damages of $30,000. The matter is now before the undersigned on three motions - i.e, (1) Motion of Plaintiff for New Trial as to Compensatory Damages (Plaintiff No. 83), (2) Motion of Defendant for Judgment Notwithstanding the Verdict, or Alternatively Motion to Amend the Judgment (Paper No. 84) and (3) Motion of Plaintiff for Attorneys' Fees (Paper No 86). Opposition was filed as to all motions. (Papers No. 88, 91, and 93). A hearing was held on all open motions on October 20, 1983.

EVIDENCE

The facts in this case, which are not really in dispute, can be summarized as follows. The decedent, Charles K. Attwood (Attwood) was the son

of the plaintiff Mildred Stetz Prior to January of 1981, Attwood lived with Marilyn A. Blann and was a father of three of her four children Attwood lived with Blann from 1975 until the end of 1980, during which time he supported both Blann and their three children as well as Blann's son by a prior marriage Toward the end of 1980, Attwood became unable to support Blann and the children because he could not hold a job due to illness. Blann contacted the Department of Social Services to obtain aid for her children and was told that she could not receive benefits if the father was still living in the same house. Therefore, in January of 1981, Attwood moved to his mother's residence, although he still saw Blann and the children three or four times a week. During the early part of 1981, Stetz took her son to look for employment. Unbeknownst to Blann, the

Department of Social Services, in early 1981, obtained a warrant for Attwood's arrest for failure to pay child support. In May and June of 1981, Attwood's condition began to worsen and he began vomiting and was unable to eat. Stetz testified that Attwood had a drinking problem, that he could not drink more than two or three drinks without getting drunk. She did state that this never interfered with his ability to care for his children. The testimony is also clear that Attwood was not a complainer, especially with regard to his own problems. On July 25, 1981, when his behavior became "bizzare", Stetz took Attwood to the Easton Memorial Hospital. He was examined in the emergency room by Dr. William H. Wood, Jr., and was then admitted to the hospital. Stetz did tell Dr. Wood and the nurses about Attwood's bizarre behavior and his previous drink-

ing problem. Dr. Wood went on vacation and Drs. Edgar Bering and Stephen P. Carney assumed Attwood's treatment. While Attwood was hospitalized, Stetz went to the Social Services Department and informed it that her son was hospitalized. She was given some papers to be signed by the treating physician and she mailed these to Dr. Carney. Attwood was discharged from the hospital on July 29, 1981. According to the records of Easton Memorial Hospital, Dr. Bering "felt" a computerized axial tomogram (CAT) scan was indicated, but it was cancelled. Plaintiff's Exhibit No. 12. Attwood was given a follow-up visit to see Dr. Bering on August 19, 1981, but he never kept that appointment. Subsequently, Stetz called Dr. Bering's office and made an appointment for August 28, 1981. On August 24, 1981, Attwood was arrested at plaintiff's home on a charge

of nonsupport. The next day Stetz visited her son at the Kent County Jail. While there, she informed one of the guards of Attwood's medical problems and told him that Attwood had an appointment with Dr. Bering the following Friday, August 28, 1981. She inquired as to whom she should see to make sure that Attwood kept the appointment, and she was referred to Dr. Grant. That same day, she called Dr. Grant's office and told his secretary what had happened. The next day, August 26, 1981, Stetz went to Dr. Grant's office and gave his secretary a detailed description of Attwood's problems. The secretary noted all of this in writing, Plaintiff's Exhibit No. 16, and indicated that she would call it to Dr. Grant's attention. Coincidentally, on August 26, 1981, Attwood had been taken before the Circuit Court for Kent County and sentenced to ninety days in

jail for failure to pay child support. On August 27, 1981, after reviewing his secretary's notes, Dr. Grant had Attwood brought by the Kent County Sheriff to his office for examination. After examining the plaintiff, Dr. Grant called Stetz and told her that he could find nothing wrong with Attwood other than sinus headaches and a history of alcoholism. The latter was based on Attwood's statement to Dr. Grant that Attwood was an alcoholic. Grant also stated to Stetz that he would not let Attwood keep his appointment with Dr. Bering as he did not think it was necessary. In addition, according to Stetz, Dr. Grant stated that the visit to Dr. Bering would tie up a trooper for one half of a day and cost the county money. Grant denies making such a statement. Thereafter, when Grant visited the Kent County Jail he inquired about Attwood's condition and was told that At-

twood was better and did not care to see him. In the late evening hours of September 4, 1981, Attwood was observed by a guard at the Kent County Jail to be confused and to have fallen. The guard called defendant Grant and was instructed to take Attwood to the Queen Anne's County Hospital. Stetz arrived at the Queen Anne's County Hospital shortly before Attwood was taken by helicopter to the Shock Trauma Unit at the University of Maryland Hospital in Baltimore. Stetz did notice that when Attwood was being taken to the helicopter he was on a respirator. Stetz arrived at the Shock Trauma Unit around 11:00 a.m. on September 5, 1981, and was told that Attwood was in "critical condition". She observed that he had a respirator in his mouth and his face was twitching. Shortly thereafter Attwood died. The cause

of death was listed a a brain tumor, Astrocytoma, Grade II.

Based on the above facts, the plaintiff contends that Dr. Grant, acting under color of state law, displayed a deliberate indifference to Attwood's serious medical needs. Defendant Grant denies that he acted under color of state law at anytime pertinent to the facts of this ase. Additionally, Grant denies that he was deliberately indifferent to Attwood's serious medical needs.

To substantiate plaintiff's allegations, plaintiff produced the testimony of Drs. Edgar A. Bering, Jr. and Stewart A. Grossman. Dr. Bering, a Board Certified Neurological Surgeon, was asked by Dr. William H. Wood, Jr. to examine Attwood at the Easton Memorial Hospital in July of 1981. Based on his examination of Attwood and the history given, Dr. Bering felt that Attwood "was a per-

son with a frontal lobe tumor". It was Dr. Bering's opinion that Attwood should be studied further and "worked up" until a tumor was ruled out. Dr. Bering ordered a CAT scan on July 27, 1981, and it was scheduled for July 30, 1981. However, on July 29, 1981, when Attwood seemed to have improved and did not need acute care in the hospital, Attwood was discharged. Dr. Bering felt that Attwood's "work up" could be done on an out patient basis. The CAT scan scheduled for July 30, 1981 was cancelled, although Dr. Bering did not know why. He scheduled a follow-up appointment with Attwood on August 19, 1981, which Attwood did not keep. Dr. Bering's office did not attempt to find out why Attwood had not shown up for that appointment but the plaintiff rescheduled an appoint ment for Attwood on August 28, 1981. Dr. Bering, after reviewing the University

of Maryland Hospital records, agreed that the cause of death was a large frontal cerebral tumor. It was Dr. Bering's opinion that if a CAT scan had been performed prior to September 4, 1981, the tumor would have been revealed and "was probably surgically operable". According to Dr. Bering, fifty per cent of those individuals who have a Grade II Astrocytoma and who undergo surgery live twenty-eight months or longer. Dr. Bering felt that Attwood's tumor probably "took quite a long time to grow". By this, Dr. Bering meant "many months". Dr. Bering did not tell either Attwood or the plaintiff that he suspected that Attwood had a braintumor. In Dr. Bering's opinion, on August 27, 1981, Attwood had a serious medical need and defendant Grant was indifferent to that serious medical need. Dr. Bering felt that Dr. Grant should have allowed Attwood to keep the August

28, 1981, appointment with Dr. Bering, should have checked with Dr. Bering, and should have checked the Easton Memorial Hospital records. Dr. Bering did agree that defendant took a thorough history from Attwood when he examined him and performed a thorough physical examination. Dr Bering stated that even if the tumor had been diagnosed in July or August of 1981, it would have eventually caused Attwood's death, as eighty per cent of Grade II Astrocytomas are malignant. Dr. Bering felt that Defendant Grant exercised his medical judgment and that this was the basis of Dr. Bering's disagreement with defendant Grant's actions in this case. Simply put, Dr. Bering felt that defendant Grant should have pursued his investigation of the plaintiff's medical problems.

Dr. Stewart A. Grossman, who is Board Certified in Internal Medicine,

never examined Attwood, but reviewed all of Attwood's medical records. Although he had never diagnosed a brain tumor, Dr. Grossman felt that a Grade II Astrocytoma could be treated by reducing the edema in the brain with steroids, surgical removal of the tumor itself, and radiation or chemotherapy if needed. He agreed with Dr. Bering that the average survival rate for patients with this disease is approximately two years, but added that because of Attwood's age, he might have survived longer than two years. Dr. Grossman stated that the CAT scan is the test universally used to diagnose brain tumors and that such a test was well known to the medical profession in the summer of 1981. Dr. Grossman felt that on August 27, 1981, Attwood had a serious medical need which "should have been apparent" to defendant Grant. Dr. Grossman felt that defendant

Grant should have taken the "extra steps" to see if it was important for Attwood to be examined by Dr. Bering on August 28, 1981. Dr. Grossman agreed with Dr. Bering that defendant Grant took a thorough history and performed a thorough examination of the plaintiff. In addition, Dr. Grossman's review of the medical records found no evidence to suggest that defendant Grant was cruel to Attwood. Rather, a review of the records indicates that defendant Grant treated the conditions he diagnosed. However, Dr. Grossman reiterated that Grant should have gone "the extra step" in his investigation.

DISCUSSION

In ruling on the plaintiff's motion for a new trial as to compensatory damages and on the defendant's motion for a judgment notwithstanding a verdict or alternatively to amend the judgment, "the

trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion." Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980).[2/]

In Estelle v. Gamble, 429 U.S. 97 (1976) the Supreme Court enunciated the standard "that deliberate indifference to serious medical needs or

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2. Because of the Court's ruling on defendant's motion for a judgment notwithstanding the verdict, it is unnecessary to reach either the plaintiff's motion for a new trial as to compensatory damages or plaintiff's motion for attorneys' fees. Suffice it to say that, regarding plaintiff's motion for a new trial as to compensatory damages, plaintiff stipulated that "on September 5, 1981, Attwood collapsed in his jail cell and lost consciousness." (See Pretrial Order V 12, page 9). (Paper No. 65). Thus, the jury could have concluded that Attwood did not sustain any conscious pain or suffering which could be compensible. The jury could also have concluded that defendant Grant's actions did not accelerate, or contribute to, Attwood's death. In either event, the jury could have awarded only nominal damages.

prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . , proscribed by the Eighth Amendment." Id. at 104. The Court went on to say "[t]his conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." Id. at 105. The Court went on to state:

> [t]hus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency in violation of the Eighth Amendment."

Id. at 106.

With the Supreme Court's admonitions in mind, the Court must determine

whether plaintiff has proven a cognizable claim under 42 U.S.C. § 1983. The Court is of the opinion that she has not. The evidence is abundantly clear, and, indeed, it is substantiated by plaintiff's own experts, that defendant Grant took a "thorough" history from the plaintiff and likewise performed a "thorough" examination of the plaintiff. While it is true his diagnosis may have been incorrect, the record is devoid of any evidence which could allow a reasonable trier of fact to conclude that defendant Grant displayed a deliberate indifference to Attwood's admittedly serious medical needs. As soon as Dr. Grant was notified by his nurse of the plaintiff's concern for her son, he had Attwood brought to his office where he took the history and examined him. Additionally, defendant Grant, in Attwood's presence, called the plaintiff

and told her of his diagnosis. Indeed, the evidence is uncontradicted that defendant Grant, on his visits to the Kent County Jail after his initial examination of Attwood, asked whether Attwood wanted to be examined by him, and Attwood declined the invitation. While the plaintiff disagrees with defendant Grant's diagnosis, such a disagreement does not state a cognizable claim under 42 U.S.C. §1983. Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975). Even if there was an incorrect diagnosis, such negligence would not rise to a level of a constitutional deprivation actionable under § 1983. Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977). It is clear that plaintiff disputes Dr. Grant's medical judgment. The Fourth Circuit has held that "such judgments are not subject to judicial review, and do not rise to constitutional significance

absent 'deliberate indifference to [prisoners'] serious medical needs.'" Zaczek v. Hutto, 642 F.2d 74, 75 (4th Cir. 1981). It is likewise clear that even if the lack of prompt treatment was simply the result of an erroneous medical judgment, the plaintiff would not be entitled to relief. As the plaintiff's only complaint against defendant Grant is that he did not further investigate Attwood's medical background, and as that decision was based on defendant Grant's medical judgment and not on "deliberate indifference", the Court is left with no alternative but to grant defendant Grant's motion for a judgment notwithstanding the verdict. A separate Order will be entered accordingly.

DATE: April 2, 1984

/s/
DANIEL E. KLEIN, JR.
UNITED STATES MAGISTRATE

3064h/3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MILDRED STETZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES K. ATTWOOD, DECEASED	*	
		CIVIL ACTION NO.
v.	*	
		N 82-1168
JOHN A. GRANT, M.D.	*	

* * * * * * *

ORDER

For the reasons set forth in the foregoing Memorandum, it is this 2nd day of April, 1985, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That defendant's Motion for Judgment Notwithstanding the Verdict BE, and the same hereby IS, GRANTED.

2. That plaintiff's Motion for a New Trial as to Compensatory Damages BE, and the same hereby IS, DENIED.

3. That plaintiff's Motion for Attorneys' Fees BE, and the same hereby IS, DENIED.

4. That Judgement Be, and the same hereby IS, entered in favor of the defendant.

5. That the Clerk of Court shall mail copies of this Memorandum and this Order to all counsel of record.

/s/
DANIEL E. KLEIN, JR.
UNITED STATES MAGISTRATE

3064h/4

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MILDRED STETZ *

v. * CIVIL ACTION NO.
N 82-1168

JOHN A. GRANT, M.D. *

* * * * * * *

MEMORANDUM

Plaintiff, Mildred Stetz, instituted this action against John Grant, M.D., pursuant to 42 U.S.C. Section 1983. The complaint alleged that Dr. Grant was deliberately indifferent to the serious medical needs of the decedent, Charles K. Attwood. Defendant Grant, Kent County health officer, had contracted with Kent County to perform medical services for inmates at the Kent County jail. Attwood died as a result of a brain tumor while incarcerated at the Kent County jail. Thereafter, his mother brought this

action. The parties consented to a jury trial before a magistrate. The matter was referred to United States Magistrate Daniel E. Klein, Jr.

The jury trial commenced on June 29, 1983. On July 7, 1983, after eight days of trial, the jury returned a verdict in favor of the plaintiff and awarded $1.00 in compensatory damages and $30,000.00 in punitive damages. Thereafter, the defendant moved for a judgment notwithstanding the verdict. That motion was granted by Magistrate Klein in a memorandum and order dated April 2, 1984. Plaintiff now appeals the judgment n.o.v. to this Court pursuant to FED. R. CIV. P. 73(d).

Plaintiff appeals on the grounds that Magistrate Klein improperly substituted his opinion for that of the jury's. She argues that there was no basis for granting the motion for a judgment n.o.v.

because the verdict was supported by the evidence.

Under FED. R. CIV. P. 50(b), "a party who has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." It is well settled that a judgment n.o.v. cannot be granted except where a motion for a directed verdict has been made, and then only where the motion for a directed verdict should have been granted. That is, the motion should be granted only where there is no substantial evidence to support the verdict. Hawkins v. Sims 137 F.2d 66 (4th Cir. 1943). Furthermore, in passing upon a motion for judgment n.o.v., the evidence must be taken in the light most favorable to the party in whose favor the verdict has been returned, and all conflicts must be re-

solved in his favor. Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941). The Aetna case was recently declared as the leading Fourth Circuit authority in this area of the law in Grady v. McDannald, No. 83-1450, slip op. at 4 (4th Cir., June 22, 1984). See also: Wyatt v. Interstate Ocean Transport Co., 623 F.2d 881, 891 (4th Cir. 1980).

It is against the Aetna standard that Magistrate Klein's decision to grant the judgment n.o.v. must be reviewed. The evidence adduced at trial can be summarized as follows. On August 24, 1981, Charles Attwood was arrested for non-support and taken to the Kent County jail. At the jail, Attwood filled out several preliminary forms and was questioned by the interviewing deputy as to a previous hospital stay which occurred one month earlier. Mr. Attwood responded

by saying that he was "OK now." (Transcript, Leverage testimony, at 2).

Dr. Grant, the defendant in the action below, had entered into a written agreement with the Kent County Commissioners to serve as "jail physician." (Plaintiff's Exhibit 14). Dr. Grant first learned of Mr. Attwood on August 27, 1981, when the doctor received a note from his nurse, Ms. Dick. (Transcript, Grant testimony, 6/30/83, at 8-9). The note stated:

Charles Attwood Mother's # 552-6132
Kent Co. Jail

> 8/26/81 Above's mother Mrs. Stetz from Church Hill visited KCHD today. States son taken to jail 8/24/81 p.m. for NON-support. Apparently on 7/25/81 Chas Atwood (sic) had "spell" and fell from chair to floor "did not faint" Was seen - E.R. of Easton Memorial Hospital and admitted. Discharged 7/29/81. Apparently seen by Dr. Bering, neurologist, while a patient in Easton. Apparently mother was told by a Dr. Wood that patient should have a CAT scan.

> Pt. has appt with Dr. Bering of Talbottown, Easton, at 10:30 a.m. on August 28th.
>
> Mother states her son had encephalitis as child. Mother feels that son is deteriorating. She claims he has lost much of hearing left ear. She states that he walks like an old man. She states that Charles Attowood (sic) tells her his head hurts but that he has said nothing to the jailers. She states he's not one to complain. Mother is most anxious that her son be able to keep appt with Dr. Bering on Friday a.m. (1) Can you see him? (2) Can you arrange to have him taken for checkup with Dr. Bering?
>
> Dick
> Medical No. 170-116-914-40

After receiving the note, Dr. Grant made arrangements to examine Mr. Attwood and did examine Mr. Attwood. During the examination, Dr. Grant filled out a medical history form. While filling out the form, the doctor asked Mr. Attwood a variety of questions about various physical symptoms and conditions. The evidence shows that Mr. Attwood answered affirmatively when asked whether he had

experienced the following physical conditions: night sweats, cramps in legs, recent gain or loss of weight, frequent indigestion, epilepsy or seizures, paralysis, numbness or weakness, dizziness and fainting spells, nervous problems, and alcoholism.

Dr. Grant testified that the symptoms described above could be attributable to alcoholism. He indicated that the numbness and paralysis would be due to sleeping in one position which is common among alcoholics who sleep in a deep, drugged state. (Transcript, Grant testimony, 6/30/84 at 20). He further stated that the headaches were due to sinusitis. The testimony is undisputed that this was Dr. Grant's diagnosis of Mr. Attwood's ailment. The evidence also shows that Dr. Grant inquired on a later date whether Mr. Attwood would like to be examined by him, and Attwood

declined. Moreover, the evidence also shows that Dr. Grant called the plaintiff, Attwood's mother, in the presence of Attwood, and told her his final diagnosis.

After the examination of Attwood, Dr. Grant decided that it was unnecessary for Attwood to attend an appointment which he had with a Dr. Bering, a neurologist. Dr. Bering testified that the appointment was for purposes of doing a CAT scan on Mr. Attwood. Dr. Bering had previously examined Mr. Attwood at Easton Memorial Hospital. Attwood had been admitted to the hospital on June 25, 1981, after his mother informed the attending physician that Attwood was exhibiting bizarre behavior and had a drinking problem. Attwood was discharged from the hospital on July 29, 1981. According to hospital records, Dr. Bering felt that a CAT scan was indi-

cated, but a scheduled CAT scan was cancelled. Subsequently Mrs. Stetz called Dr. Bering's office and made an appointment for August 28, 1981. On August 24, 1981, Attwood was arrested at plaintiff's home on a charge of non-support. Once he was incarcerated, Attwood had to obtain the approval of Dr. Grant to attend the appointment. As noted above, Dr. Grant attributed all of Mr. Attwood's symptoms to alcoholism and sinusitis and, therefore, believed that the appointment with the neurologist was unnecessary.

Based upon this evidence, it was plaintiff's argument that Dr. Grant was deliberately indifferent to Attwood's serious medical needs, and thereby violated the decedent's Eighth Amendment rights as defined in Estelle v. Gamble, 429 U.S. 97 (1976). Magistrate Klein, however, found that the evidence did not

support such a finding by the jury. Magistrate Klein's reasoning was that, although the plaintiff may disagree with defendant Grant's diagnosis, such a disagreement does not state a cognizable claim under 42 U.S.C. Section 1983. He further found that even though there was an incorrect diagnosis, such negligence would not rise to a level of a constitutional deprivation actionable under Section 1983. Stetz v. Grant, N 82-1168, slip op. at 10-11 (D. Md. April 2, 1984).

As the magistrate held, the test for determining whether Eighth Amendment rights have been violated in conection with medical treatment is that the defendant must be "deliberately indifferent to the plaintiff's serious medical needs." Estelle v. Gamble 429 U.S. at 104. Specifically, the Supreme Court, in Estelle, stated:

> [A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency in violation of the Eighth Amendment.'

Estelle, 429 U.S. at 106.

The United States Court of Appeals for the Fourth Circuit has been presented with this issue several times and one such case, in particular, has a factual pattern quite similar to the instant case. Specifically, in Webster v. Jones, 554 F.2d 1285 (4th Cir. 1977), the plaintiff had complained of eye problems to the prison doctor. The plaintiff further contended that the doctor cursorily examined him after his initial complaint and never reexamined him des-

pite his later complaints The doctor, however, claimed that he examined the plaintiff several times and found no eye problems. After plaintiff filed the complaint, the prison doctor sent him to an eye specialist who found that Webster's vision in his left eye had deteriorated to 20/400 and that he had suffered from a detached retina and iritis. Id. at 1286.

Based on these facts, the Fourth Circuit held:

> Measured by [the Estelle] standard, Webster's allegations do not state a constitutional claim. It is undisputed that the doctor examined Webster and found no medical problem. Webster's continued complaints about the same symptoms did not persuade him to change his diagnosis on subsequent occasions. Even if the doctor were negligent in examining Webster and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs.

Webster, 554 F.2d at 1286.

The magistrate relied on the Webster case and found that Dr. Grant's diagnosis may have been incorrect and negligent, but, it did not amount to a constitutional deprivation. The Court notes that the Webster case dealt with a summary judgment by the district ccurt, whereas the instant appeal involved a judgment n.o.v. Here, as noted above, the evidence must be taken in the light most favorable to the plaintiff and all doubts should be resolved in plaintiff's favor. Wyatt v. Interstate & Ocean Transport Co., 633 F.2d 888 (4th Cir. 1980). However, this Court, after viewing the record as a whole in the light most favorable to the plaintiff, agrees with the magistrate.

The evidence established at most that Dr. Grant misdiagnosed Attwood's disease. It may be true that Dr. Grant's treatment of Mr. Attwood constituted

medical malpractice. However, it will be noted that the evidence showed that Grant examined Attwood, and later offered to reexamine him. It is true that Dr. Grant did not obtain the Easton Memorial Hospital records and did not review these past records. Yet, it is also shown in the evidence that Dr. bering, who obviously had access to all records, released Mr. Attwood from hospital care without performing the CAT scan. This simply adds to the finding that although Dr. Grant may have misdiagnosed Attwood, there is utterly no evidence or possible inference that he was deliberately indifferent to Mr. Attwood's needs. In other words, there is no evidence that Dr. Grant was deliberately indifferent to the serious medical needs of Attwood which would constitute the "unnecessary and wanton infliction of pain..." pro-

scribed by the Eighth Amendment. Estelle, 429 U.S. at 104.

This Court finds, as the magistrate found, that based upon the entire record plaintiff's evidence raised only questions of medical judgment, not of deliberate indifference. In other words, the case should never have gone to the jury, and a directed verdict should have been granted. Further, this Court finds that reasonable and fair-minded persons in the exercise of impartial judgment and based on the evidence presented, could not have properly returned a verdict in favor of the plaintiff in this action. Plaintiff's remedy lies in state court as a medical malpractice action, not in federal court as a civil rights complaint.

This Court finds it unnecesary to reach the issue involving "color of

state law" presented by defendant/appellee in his appeal brief.

In his order, Magistrate Klein denied the motion for a new trial. This will be affirmed as will the entry of judgment in favor of the defendant notwithstanding the verdict.

A separate order will be issued in accordance with this memorandum opinion.

/s/
Edward S. Northrop
Senior United States District Judge

DATED: 29th June, 1984

3064h/5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MILDRED STETZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES K. ATTWOOD, DECEASED	*	
	*	CIVIL ACTION NO.
v.	*	
		N 82-1168
JOHN A. GRANT, M.D.	*	

* * * * * * *

ORDER

In accordance with the foregoing memorandum, and for the reasons stated herein, IT IS, this 29th day of June, 1984, by the United States District Court for the District of Maryland, ORDERED:

1. That the judgment non obstante veredicto, entered in favor of the defendant by United States Magistrate Daniel E. Klein, Jr., BE, and the same hereby IS, AFFIRMED;

2. That the denial of plaintiff's motion for a new trial by United States Magistrate Daniel E. Klein BE, and the same hereby IS, AFFIRMED;

3. That the Clerk of Court enter this case as CLOSED on this Court's docket; and

4. That the Clerk of Court mail copies of this Order and the foregoing opinion to counsel for the parties in this action.

/s/
Edward S. Northrop
Senior United States District Judge

3064h/6

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILDRED STETZ, Personal Representative of the Estate of CHARLES K. ATTWOOD, Deceased,

Petitioner,

—against—

JOHN A. GRANT, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID R. THOMPSON
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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURTS, REVIEWING THE ENTIRE RECORD, CORRECTLY CONCLUDED THAT THE EVIDENCE ADDUCED AT TRIAL RAISED ISSUES OF MEDICAL JUDGMENT BUT DID NOT FAIRLY ESTABLISH DELIBERATE INDIFFERENCE TO AN APPARENT MEDICAL NEED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MILDRED STETZ, Personal Representative
of the Estate of
Charles K. Attwood, Deceased,

Petitioner,

v.

JOHN A. GRANT, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Mildred Stetz, the mother of Charles K. Attwood and the personal representative of his estate, initiated this action

in the United States District Court for the District of Maryland. The complaint alleged that John Grant, M.D., committed medical malpractice in his diagnosis and treatment of Mr. Attwood's physical symptoms. Mrs. Stetz also asserted a claim under 42 USC §1983, asserting that Dr. Grant was deliberately indifferent to her son's serious medical condition. At the time Dr. Grant examined and treated Mr. Attwood, the patient was an inmate in the jail in Kent County, Maryland. Dr. Grant was the state and local public health officer. His responsibilities to jail inmates were not created by state or local law. Dr. Grant served as "jail physician" pursuant to a written contract with the Kent County legislative body.

Because Mrs. Stetz had failed to file her medical negligence claims in Maryland's Health Claims Arbitration Office prior to the institution of suit,

the district court dismissed the malpractice counts. The case was tried on the §1983 claim that Dr. Grant was deliberately indifferent to a serious medical condition, thereby inflicting cruel and unusual punishment on the plaintiff's decedent. The jury returned a verdict of $1.00 in nominal damages and $30,000.00 in punitive damages. Dr. Grant's motion for judgment notwithstanding the verdict was granted by United States Magistrate Daniel E. Klein, who presided over the jury trial by agreement of the parties. The plaintiff appealed Magistrate Klein's decision to the district court. Senior Judge Edward S. Northrop reviewed the record and heard the appeal pursuant to Fed. R. Civ. Pro. 73(d). He affirmed the decision of Magistrate Klein. Thereafter, pursuant to 28 USC §636(5), Mrs. Stetz petitioned the United States Court of Appeals for the Fourth Circuit for

leave to appeal the decision of the district court. The Fourth Circuit granted the petition, and the case was fully briefed and argued. After carefully considering the arguments of counsel and the entire record, the Fourth Circuit affirmed the entry of judgment for Dr. Grant. During the pendency of the appeal before the Fourth Circuit, Mrs. Stetz filed her medical malpractice claims in Maryland's Health Claims Arbitration Office.

The evidence in the district court established that Mr. Attwood's first documented episodes of illness began in the spring of 1978. At that time, he was seen by at least two neurologists, a psychiatrist, and various clinicians. He complained of dizziness, headaches, black outs, disorientation, outbursts of violence, blurred vision, and memory loss. He was seen on numerous occasions, and

ultimately diagnosed as a chronic alcoholic. He was referred to a residential alcoholic treatment program, but never enrolled. His problems persisted, and he was unable to hold a job. In 1981, he left his common law wife and three children to facilitate their receiving benefits from Maryland's Department of Social Services. At that time, Mr. Attwood moved in with his mother, Mrs. Stetz.

His headaches continued, together with occasional episodes of behavior which his mother felt to be unusual, and Mrs. Stetz urged her son to seek medical attention. Other than seeing a local physician for a prescription for antabuse, a drug to help control alcoholism, Mr. Attwood declined to seek medical attention. In July of 1981, while in his mother's presence, Mr. Attwood had an episode of very unusual behavior in which he seemed to lose all awareness of his

surroundings. His mother got him into the car and began the trip to the local hospital, some twenty miles away. While en route, Mr. Attwood regained his awareness, and informed his mother he did not wish to go to the hospital's emergency room. She acceded to his wishes, and returned home.

Later the same evening, Mr. Attwood had a similar episode, and this time, Mrs. Stetz successfully got him to the emergency room at the hospital in Easton, Maryland. He was seen first by an emergency room physician, then by an internist, Dr. Wood. Dr. Wood found Mr. Attwood to be confused and disoriented, and admitted him to the hospital for diagnostic testing. Mr. Attwood was referred to the staff neurosurgeon, Dr. Edgar Bering, who followed him in the hospital from July 26, 1981, through July 29, 1981. During the course of Mr.

Attwood's hospitalization, a battery of diagnostic tests were performed, including a brain scan, an EEG, and a lumbar puncture. In addition, a CAT scan was scheduled for July 30, 1981. CAT scan equipment was not then available in Easton, and the appointment was made at another hospital, approximately 60 miles away. During the course of his hospitalization, Mr. Attwood's physical condition steadily and dramatically improved. The neurosurgeon was sufficiently satisfied with Mr. Attwood's recovery that on July 29, 1981, the neurosurgeon authorized Mr. Attwood's discharge from the hospital. Mr. Attwood was discharged without diagnosis, and the CAT scan scheduled for July 30, 1981, was cancelled. No CAT scan was ever rescheduled by Dr. Bering or any other physician. The Easton Memorial Hospital records state that Mr. Attwood became "entirely

well." His treating neurosurgeon did not discuss Mr. Attwood's medical problems with him, nor with his mother. A routine follow up appointment was scheduled for August 19, 1981, three weeks later. The final diagnosis entered on the hospital's discharge summary was "stupor and headache, cause not determined."

Mr. Attwood failed to keep his July 19, 1981 follow-up appointment with Dr. Bering, the neurosurgeon. Dr. Bering never followed up in any way either before or after his patient failed to appear for the appointment. During the period following his discharge from the hospital, Mr. Attwood's mother urged him to go back to see the doctor or to return to the hospital, but he refused. On August 24, 1981, Mrs. Stetz took matters into her own hands and made an appointment for her son to see Dr. Bering on August 28, 1981.

On the same day that she made that appointment, her son was arrested pursuant to an outstanding bench warrant for contempt of court, issued as the result of Mr. Attwood's failure to make child support payments. Mr. Attwood was sentenced to the Kent County jail for a period not to exceed ninety days, or until he paid $756.00, his child support arrearage.

Upon his admission to the jail, Mr. Attwood was questioned concerning his physical condition as part of the medical screening process. Mr. Attwood told the admitting officer that he had been recently hospitalized for headaches, but that he was no longer having any problem. Nothing unusual about his behavior or physical condition was observed.

Mrs. Stetz visited the jail the day after her son's arrest and told the officer on duty about Mr. Attwood's

hospitalization and the appointment she had scheduled for August 28 with Dr. Bering. The officer referred her to Dr. Grant. The next day, August 26, she went to Dr. Grant's office and, in his absence, described her concerns to the nurse, asking that Mr. Attwood be sent to Dr. Bering's office to keep the appointment she had arranged. The nurse passed on her notes concerning this conversation to Dr. Grant when he returned to the office the next day. Dr. Grant immediately made arrangements to have Mr. Attwood brought to his office for examination. That same afternoon, August 27, Mr. Attwood was escorted to Dr. Grant's office from the jail by a sheriff's deputy. At that time Dr. Grant gave Mr. Attwood a physical examination and took his medical history. Dr. Bering, plaintiff's expert witness and the neurosurgeon who examined Mr. Attwood

at Easton Memorial Hospital, admitted in his testimony that Dr. Grant's examination and medical history were very thorough. Based upon that physical examination and the history given to him by Mr. Attwood, which included Mr. Attwood's description of long term alcoholism and the extensive neurological testing recently performed at Easton Memorial Hospital, followed by his subsequent discharge without diagnosis, Dr. Grant concluded that Mr. Attwood's neurological symptoms were caused by alcoholism. The headaches, Dr. Grant concluded, resulted from sinusitis and the hearing problem was due to impacted ear wax. Mr. Attwood, of course, did not tell Dr. Grant about the possibility that he was suffering from a brain tumor, nor did the message from Mrs. Stetz mention that possibility, since that information had not been given to them. Instead, Mr.

Attwood described the extensive testing done at Easton Memorial Hospital and advised Dr. Grant that the hospital had found nothing wrong with him. He also told Dr. Grant during the examination that he felt his mother was overly concerned.

Dr. Bering, employed as the plaintiff's expert at trial, stated in his testimony that Mr. Attwood's medical need at the time of Dr. Grant's examination was latent and not obvious. Indeed, the circumstantial evidence establishes that Mr. Attwood's medical need was not even apparent after four days of hospitalization and testing at Easton Memorial Hospital. It is undisputed that Mr. Attwood was discharged on Dr. Bering's orders, and that future diagnostic procedures were cancelled, and that only a routine follow-up appointment was scheduled. Even though Dr. Bering became

aware that his patient's CAT scan had been cancelled, he did not reschedule that procedure. Dr. Bering testified that Dr. Grant exercised his medical judgment, treated the conditions he found, and that the real issue in the case was a question of the medical judgment exercised by Dr. Grant. Dr. Stuart Grossman, plaintiff's other expert witness, declined on direct examination to testify that Dr. Grant was indifferent to Mr. Attwood's serious medical need or condition. Dr. Grossman's criticism of Dr. Grant's treatment was not that Dr. Grant was indifferent to the patient, but rather, that "he did not go the extra step" in his treatment and diagnosis.

Following his examination of Mr. Attwood, because of Mrs. Stetz's concerns, Dr. Grant communicated his diagnosis to her in a telephone call. Dr. Grant prescribed actifed for the

sinusitis which he had diagnosed and advised his patient that tylenol or aspirin were available at the jail upon request. He also explained to both Mr. Attwood and his mother that he would keep an eye on Mr. Attwood while he was incarcerated to see if his headaches improved under the actifed regimen. Mrs. Stetz agreed that Dr. Grant told her that in his opinion, the appointment with Dr. Bering was not necessary, that he believed the sinusitis treatment would help the headaches, and that Mr. Attwood would be monitored closely for any changes in condition.

Dr. Grant's next contact with Mr. Attwood occurred on September 1, 1981. During a sick call at the jail, he inquired specifically whether Mr. Attwood wanted to see him. Mr. Attwood declined to be seen by the doctor, and stated that his headaches had improved, suggesting

that the actifed was working. In fact, the jail records indicate that Mr. Attwood requested aspirin only twice during his confinement at the jail, once on August 26 prior to Dr. Grant's prescription, and thereafter on September 4, the evening he collapsed. There is no indication in the record that while at the jail, Mr. Attwood displayed any of the severe symptoms which he exhibited prior to and during his stay at Easton Memorial Hospital. Indeed, the testimony was to the contrary. In addition, there is no indication that Mr. Attwood ever requested medical treatment or medication other than the aspirin dispensed to him on two occasions, nor did he ever ask to be taken to the August 28th appointment with Dr. Bering. On August 26, 1981, the deputy dispensing the aspirin to Mr. Attwood inquired as to his physical condition and Mr. Attwood replied that

there was nothing wrong, he just had a headache. The deputy who gave tylenol to Mr. Attwood on September 4, 1981, during a conversation of some 5 to 8 minutes, noticed nothing unusual about his physical condition. Upon being asked by the deputy if he needed to see the doctor or nurse, Mr. Attwood's response was negative and he said it was just a headache.

That same evening, just before midnight, Mr. Attwood suddenly collapsed in his cell. He was taken to the Kent-Queen Anne Hospital, where he was seen by Dr. Grant. At that time, based upon the collapse related symptoms then apparent, Dr. Grant suspected a brain lesion. Mr. Attwood was flown to the University of Maryland Shock Trauma Unit in Baltimore, where he died on September 5, 1981. An autopsy revealed that Mr. Attwood had been suffering from a brain tumor.

Summary of Argument

The writ should be denied because the trial court and appellate courts correctly applied the standard set forth in Estelle v. Gamble, 429 U.S. 97 (1976). Reviewing the entire record, the lower courts properly determined that the petitioner's case raised issues of medical judgment and did not create a jury question under the Eighth Amendment. The decisions of the district court and the Fourth Circuit are consistent with settled law, and neither require the exercise of this Court's power of supervision, nor do those decisions conflict with applicable decisions of this Court.

While the courts below found it unnecessary to address whether Dr. Grant acted under color of state law, the evidence in this case establishes that Dr. Grant, who had no state created custodial responsibilities with respect to the

plaintiff's decedent, exercised his professional judgment as a physician, and did not act under color of state law so as to create a jury question under 42 U.S.C. §1983.

ARGUMENT

I. The Eighth Amendment Issue

The courts below recognized that the legal standard applicable to the Eighth Amendment aspect of plaintiff's claims was established by this Court in Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976). There, the Court concluded that "deliberate indifference to serious medical needs of prisoners" may give rise to a cause of action under 42 U.S.C. 1983. 429 U.S. at 104. However, the Court was careful to qualify its conclusion by pointing out that:

> In the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of

> pain' or to be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

429 U.S. at 106. The Court carefully distinguished between "deliberate indifference" and the exercise of a physician's medical judgment. Matters of medical judgment and differences of opinion with respect to medical treatment and diagnosis do not rise to the level of a constitutional violation. Indeed, the Court specifically declared that:

> the question whether an X-ray -- or additional diagnostic techniques or forms of treatment -- is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice and as such

> the proper forum is the state court... .

429 U.S. at, 107.

Clearly, the standard established by the Court in Estelle requires evidence of conduct which can fairly be characterized as the "unnecessary and wanton infliction of pain" or which is so outrageous that it is "repugnant to the conscience of mankind." Dr. Grant argued below, and the lower courts agreed, that in order to create a jury question concerning "deliberate indifference to a serious medical need," there must be evidence that a serious need for medical treatment was apparent and ignored.

Both the district court and the Fourth Circuit reviewed the record in this case in the context of Estelle and its Fourth Circuit progeny. Those cases included a Fourth Circuit decision factually analogous to the case now before

this Court. In Wester v. Jones, 554 F.2d 1285 (4th Cir. 1977), a prison inmate received a physical examination, including an eye examination and vision test, upon his commitment. He told the prison physician then that he had suffered an injury to his eye. Thereafter, and over the next year, Wester complained repeatedly of pain and loss of vision. Despite his medical history and his frequent requests, he received no additional treatment or diagnostic attention. In his §1983 suit, Wester alleged that the physician had made only a cursory initial examination and that he failed to re-examine him even after specific complaints. Subsequent to the filing of suit, the doctor defendant arranged to have Wester examined by a specialist. It was then determined that Wester had a serious problem with his eye that had existed at the time of the initial

examination, and that his vision had significantly deteriorated during his incarceration. The underlying serious medical condition was not immediately apparent and had not been perceived by the doctor during his initial examination. In affirming the district court's entry of summary judgment for the doctor, the Fourth Circuit applied Estelle and found that no constitutional claim had been stated. The Court noted that:

> It is undisputed that the doctor examined Wester and found no medical problem. Wester's continued complaints about the same symptoms did not persuade him to change this diagnosis on subsequent occasions.
>
> Even if the doctor were negligent in examining Wester and in making an incorrect diagnosis, his failure to exercise sound professional judgment would not constitute deliberate indifference to serious medical needs.

Wester v. Jones, supra, at 1286. See also, Zaczek v. Hutto, 642 F.2d 74 (4th

Cir. 1981). Indeed, as the Fourth Circuit noted in Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975), "mistreatment or non-treatment must be capable of characterization as 'cruel and unusual punishment' in order to present a colorable claim under §1983." See also Brown v. Commissioner of Cecil County Jail, 501 F. Supp. 1124, 1126, (D. Md. 1980).

In its analysis of cases arising under Estelle, the Fourth Circuit has required, either expressly or implicitly, that the alleged serious medical condition giving rise to the claim be apparent or obvious. In Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984), for instance, the court commented that while Estelle does not require a punitive motive, it is necessary that "the need for such treatment is apparent" before liability may be imposed. Id. at 164. Similarly, in Loe

v. Armistead, 582 F.2d 1291, (4th Cir. 1978), the Court noted that within several hours after the plaintiff fell on a jail basketball court, "it was obvious that the arm was broken since it was swollen around the upper forearm and elbow and it was locked in an extraordinary position." Id. at 1292 (emphasis supplied). Petitioner has not suggested that the Fourth Circuit's analysis of these issues is in conflict with the decisions of any other circuit. Respondent submits that the instant case was correctly decided below in accordance with the guidance of this Court as explained in Estelle. Mr. Attwood's brain tumor and his need for sophisticated diagnostic techniques were not apparent to the hospital based physicians who treated him in Easton and discharged him without a final diagnosis. Similarly, those needs were not apparent to the

neurosurgeon who scheduled a routine follow-up appointment for three weeks later, and who never mentioned a suspicion of a brain tumor to the patient or his family. Dr. Grant exercised the same medical judgment that his colleagues exercised. The exercise of incomplete or incorrect judgment does not rise to the level of an Eighth Amendment violation. Accordingly, there is no basis to grant the writ requested by petitioner.

A review of a sample of cases from other circuits suggests that the principles established in Estelle are well understood and consistently and appropriately applied. See., e.g. Benson v. Cady, 761 F.2d 335 (7th Cir. 1985); Johnson v. Treen, 759 F.2d 1236 (5th Cir. 1985); Bass v. Sullivan, 550 F.2d 229 (5th Cir. 1977).

II. Dr. Grant did not act under color of state law

Neither the trial magistrate who granted Dr. Grant's motion for judgment N.O.V. nor the reviewing courts addressed Dr. Grant's argument that under the facts of this case, Dr. Grant did not act under color of state law. Analysis of that issue provides another basis to deny the petition herein.

Dr. Grant's jail related responsibilities were not created by state or local law; rather, they were created by his contract with the local legislative body. While Dr. Grant was employed as a state and local public health official, that position did not require him to treat jail inmates. In examining Mr. Attwood and evaluating whether there was a medical need which required immediate referral to another physician, Dr. Grant

exercised the traditional function of a treating physician. His treatment and diagnosis of Mr. Attwood's physical symptoms were not the result of state created custodial obligations. Under the principles enunciated by this Court in Polk County v. Dodson, 454 U.S. 312 (1981), Dr. Grant did not act under color of state law, and for this reason, a writ should not be granted.

III. The Courts Below, After Reviewing The Entire Record Correctly Affirmed The Entry Of Judgment For Dr. Grant

After reviewing the entire record in this case, the trial magistrate, the reviewing district judge, and the Fourth Circuit correctly determined that the plaintiff's evidence raised only questions of medical judgment, and that the case never should have gone to jury. Not only was there insufficient evidence

to establish that Mr. Attwood's medical needs were apparent and serious, the evidence overwhelmingly established that Dr. Grant was attentive to his patient, examined and treated him promptly, and followed up with the patient several days later. Under the circumstances presented by this case, "reasonable and fair-minded persons in the exercise of impartial judgment and based upon the evidence presented, could not have properly returned a verdict in favor of the plaintiff in this action." Plaintiff argues that there were "permissible inferences" of deliberate indifference which the jury was entitled to draw. However, as the Fourth Circuit repeated in Wratchford v. S.J. Groves & Sons, Co., 405 F.2d 1061, 1066 (4th Cir. 1969):

> "Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the

> Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture."

Id.; citation omitted. As the district court noted, plaintiff's claims in this case more properly lie in the state court system where they are presently pending, to be resolved under the traditional principles applicable to claims of medical negligence and medical standards of care. In this regard, it is noteworthy that the evidence presented by the plaintiff did not illustrate any outrageous conduct "repugnant to the conscience of mankind," nor was there any evidence that Mr. Attwood was subjected to "the unnecessary and wanton infliction of pain" contemplated by Estelle. Rather, the plaintiff presented expert medical opinion testimony which criticized the medical judgment exercised by Dr. Grant, but

as noted by the lower courts, the medical experts expressly declined to testify that Dr. Grant was indifferent to his patient. In essence, they testified that there were "clues" from which a more complete diagnosis could have been pursued. These circumstances however, do not create a constitutional violation.

CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the petition for a writ of certiorari be denied.

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